

ASSEMBLY BILL

No. 1376

Introduced by Assembly Member Harman

February 22, 2005

An act to amend Section 1428 of the Health and Safety Code, relating to long-term health care facilities.

LEGISLATIVE COUNSEL'S DIGEST

AB 1376, as introduced, Harman. Long-term health care facilities: violations.

The existing Long-Term Care, Health, Safety, and Security Act of 1973 establishes an inspection and reporting system and a provisional licensing mechanism to ensure that long-term health care facilities, as defined, are in compliance with state statutes, regulations, and standards pertaining to patient care. The act establishes a citation and appeals process.

This bill would make changes to the judicial appeals process.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: no.

The people of the State of California do enact as follows:

- 1 SECTION 1. Section 1428 of the Health and Safety Code is
- 2 amended to read:
- 3 1428. (a) If the licensee desires to contest a citation or the
- 4 proposed assessment of a civil penalty therefor, the licensee shall
- 5 use the processes described in subdivisions (b) and (c) for classes
- 6 "AA," "A," or "B" citations. As a result of a citation review
- 7 conference, a citation or the proposed assessment of a civil
- 8 penalty may be affirmed, modified, or dismissed by the director

1 or the director's designee. If the director's designee affirms,
2 modifies, or dismisses the citation or proposed assessment of a
3 civil penalty, he or she shall state with particularity in writing his
4 or her reasons for that action, and shall immediately transmit a
5 copy thereof to each party to the original complaint. If the
6 licensee desires to contest a decision made after the citation
7 review conference, the licensee shall inform the director in
8 writing within 15 business days after he or she receives the
9 decision by the director's designee.

10 (b) If a licensee notifies the director that he or she intends to
11 contest a class "AA" or a class "A" citation, the licensee may
12 first, within 15 business days after service of the citation, notify
13 the director in writing of his or her request for a citation review
14 conference. The licensee shall inform the director in writing,
15 within 15 business days of the service of the citation or the
16 receipt of the decision of the director's designee after the citation
17 review conference, of the licensee's intent to adjudicate the
18 validity of the citation in the superior court in the county in
19 which the long-term health care facility is located. In order to
20 perfect a judicial appeal of a contested citation, a licensee shall
21 file a civil action in the superior court in the county in which the
22 long-term health care facility is located. The action shall be filed
23 no later than 90 calendar days after a licensee notifies the director
24 that he or she intends to contest the citation, or no later than 90
25 days after the receipt of the decision by the director's designee
26 after the citation review conference, and served not later than 90
27 days after filing. Notwithstanding any other provision of law, a
28 licensee prosecuting a judicial appeal shall file and serve ~~an~~
29 ~~at-issue memorandum~~ *a case management statement* pursuant to
30 Rule ~~209~~ 212 of the California Rules of Court within six months
31 after the ~~state~~ department files its answer in the appeal.
32 Notwithstanding subdivision (d), the court shall dismiss the
33 appeal upon motion of the ~~state~~ department if the ~~at-issue~~
34 ~~memorandum~~ *case management statement* is not filed by the
35 ~~facility licensee~~ within the period specified. The court may
36 affirm, modify, or dismiss the citation, the level of the citation, or
37 the amount of the proposed assessment of the civil penalty.

38 (c) If a licensee desires to contest a class "B" citation, the
39 licensee may request, within 15 business days after service of the
40 citation, a citation review conference, by writing the director or

1 the director's designee of the licensee's intent to appeal the
2 citation through the citation review conference. If the licensee
3 wishes to appeal the citation which has been upheld in a citation
4 review conference, the licensee shall, within 15 working days
5 from the date the citation review conference decision was
6 rendered, notify the director or the director's designee that he or
7 she wishes to appeal the decision through the procedures set forth
8 in Section 100171 or elects to submit the matter to binding
9 arbitration in accordance with subdivision (d). The administrative
10 law judge may affirm, modify, or dismiss the citation or the
11 proposed assessment of a civil penalty. The licensee may choose
12 to have his or her appeal heard by the administrative law judge or
13 submit the matter to binding arbitration without having first
14 appealed the decision to a citation review conference by
15 notifying the director in writing within 15 business days of the
16 service of the citation.

17 (d) If a licensee is dissatisfied with the decision of the
18 administrative law judge, the licensee may, in lieu of seeking
19 judicial review of the decision as provided in Section 1094.5 of
20 the Code of Civil Procedure, elect to submit the matter to binding
21 arbitration by filing, within 60 days of its receipt of the decision,
22 a request for arbitration with the American Arbitration
23 Association. The parties shall agree upon an arbitrator designated
24 from the American Arbitration Association in accordance with
25 the association's established rules and procedures. The
26 arbitration hearing shall be set within 45 days of the election to
27 arbitrate, but in no event less than 28 days from the date of
28 selection of an arbitrator. The arbitration hearing may be
29 continued up to 15 additional days if necessary at the arbitrator's
30 discretion. Except as otherwise specifically provided in this
31 subdivision, the arbitration hearing shall be conducted in
32 accordance with the American Arbitration Association's
33 established rules and procedures. The arbitrator shall determine
34 whether the licensee violated the regulation or regulations cited
35 by the department, and whether the citation meets the criteria
36 established in Sections 1423 and 1424. If the arbitrator
37 determines that the licensee has violated the regulation or
38 regulations cited by the department, and that the class of the
39 citation should be upheld, the proposed assessment of a civil
40 penalty shall be affirmed, subject to the limitations established in

1 Section 1424. The licensee and the department shall each bear its
2 respective portion of the cost of arbitration. A resident, or his or
3 her designated representative, or both, entitled to participate in
4 the citation review conference pursuant to subdivision (f), may
5 make an oral or written statement regarding the citation, at any
6 arbitration hearing to which the matter has been submitted after
7 the citation review conference.

8 (e) If an appeal is prosecuted under this section, including an
9 appeal taken in accordance with Section 100171, the ~~state~~
10 department shall have the burden of establishing by a
11 preponderance of the evidence that (1) the alleged violation did
12 occur, (2) the alleged violation met the criteria for the class of
13 citation alleged, and (3) the assessed penalty was appropriate.
14 The ~~state~~ department shall also have the burden of establishing
15 by a preponderance of the evidence that the assessment of a civil
16 penalty should be upheld. If a licensee fails to notify the director
17 in writing that he or she intends to contest the citation, or the
18 proposed assessment of a civil penalty therefor, or the decision
19 made by the director's designee, after a citation review
20 conference, within the time specified in this section, the decision
21 by the director's designee after a citation review conference shall
22 be deemed a final order of the ~~state~~ department and shall not be
23 subject to further administrative review, except that the licensee
24 may seek judicial relief from the time limits specified in this
25 section. If a licensee appeals a contested citation or the
26 assessment of a civil penalty, no civil penalty shall be due and
27 payable unless and until the appeal is terminated in favor of the
28 ~~state~~ department.

29 (f) The director or the director's designee shall establish an
30 independent unit of trained citation review conference hearing
31 officers within the ~~state~~ department to conduct citation review
32 conferences. Citation review conference hearing officers shall be
33 directly responsible to the deputy director for licensing and
34 certification, and shall not be concurrently employed as
35 supervisors, district administrators, or regional administrators
36 with the licensing and certification division. Specific training
37 shall be provided to members of this unit on conducting an
38 informal conference, with emphasis on the regulatory and legal
39 aspects of long-term health care.

1 Where the ~~state~~ department issues a citation as a result of a
2 complaint or regular inspection visit, and a resident or residents
3 are specifically identified in a citation by name as being
4 specifically affected by the violation, then the following persons
5 may attend the citation review conference:

- 6 (1) The complainant and his or her designated representative.
- 7 (2) A personal health care provider, designated by the resident.
- 8 (3) A personal attorney.
- 9 (4) Any person representing the Office of the State Long-Term
10 Care Ombudsman, as referred to in subdivision (d) of Section
11 9701 of the Welfare and Institutions Code.

12 Where the ~~state~~ department determines that residents in the
13 facility were threatened by the cited violation but does not name
14 specific residents, any person representing the Office of the State
15 Long-Term Care Ombudsman, as referred to in subdivision (d) of
16 Section 9701 of the Welfare and Institutions Code, and a
17 representative of the residents or family council at the facility
18 may participate to represent all residents. In this case, these
19 representatives shall be the sole participants for the residents in
20 the conference. The residents or family council shall designate
21 which representative will participate.

22 The complainant, affected resident, and their designated
23 representatives shall be notified by the ~~state~~ department of the
24 conference and their right to participate. The director's designee
25 shall notify the complainant or his or her designated
26 representative and the affected resident or his or her designated
27 representative, of his or her determination based on the citation
28 review conference.

29 (g) In assessing the civil penalty for a violation, all relevant
30 facts shall be considered, including, but not limited to, all of the
31 following:

- 32 (1) The probability and severity of the risk which the violation
33 presents to the patient's or resident's mental and physical
34 condition.
- 35 (2) The patient's or resident's medical condition.
- 36 (3) The patient's or resident's mental condition and his or her
37 history of mental disability.
- 38 (4) The good faith efforts exercised by the facility to prevent
39 the violation from occurring.
- 40 (5) The licensee's history of compliance with regulations.

(h) Except as otherwise provided in this subdivision, an assessment of civil penalties for a class “A” or class “B” violation shall be trebled and collected for a second and subsequent violation for which a citation of the same class was issued within any 12-month period. Trebling shall occur only if the first citation issued within the 12-month period was issued in the same class, a civil penalty was assessed, and a plan of correction was submitted for the previous same-class violation occurring within the period, without regard to whether the action to enforce the previous citation has become final. However, the increment to the civil penalty required by this subdivision shall not be due and payable unless and until the previous action has terminated in favor of the ~~state~~ department.

If the class “B” citation is issued for a patient’s rights violation, as defined in subdivision ~~(e)~~ (e) of Section 1424, it shall not be trebled unless the ~~state~~ department determines the violation has a direct or immediate relationship to the health, safety, security, or welfare of long-term health care facility residents.

(i) The director shall prescribe procedures for the issuance of a notice of violation with respect to violations having only a minimal relationship to safety or health.

(j) Actions brought under this chapter shall be set for trial at the earliest possible date and shall take precedence on the court calendar over all other cases except matters to which equal or superior precedence is specifically granted by law. Times for responsive pleading and for hearing the proceeding shall be set by the judge of the court with the object of securing a decision as to subject matters at the earliest possible time.

(k) If the citation is dismissed, the ~~state~~ department shall take action immediately to ensure that the public records reflect in a prominent manner that the citation was dismissed.

(l) Penalties paid on violations under this chapter shall be applied against the ~~state~~ department’s accounts to offset any costs incurred by the state pursuant to this chapter. Any costs or penalties assessed pursuant to this chapter shall be paid within 30 days of the date the decision becomes final. If a facility does not comply with this requirement, the state department shall withhold any payment under the Medi-Cal program until the debt is satisfied. No payment shall be withheld if the ~~state~~ department

1 determines that it would cause undue hardship to the facility or to
2 patients or residents of the facility.
3 (m) The amendments made to subdivisions (a) and (c) of this
4 section by Chapter 84 of the Statutes of 1988, to extend the
5 number of days allowed for the provision of notification to the
6 director, do not affect the right, that is also contained in those
7 amendments, to request judicial relief from these time limits.

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